Supreme Court of the United States

OCTOBER TERM 1951

No. 179

OSTERMAN & HUTNER, GOLDMAN SACHS & Co., GRAHAM-NEWMAN CORPORATION, NEWMAN & GRAHAM, and ABRAHAM & Co.,

Petitioners,

against

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First Consolidated Mortgage Deed of THE RIO GRANDE WESTERN RAILWAY COMPANY, dated April 1, 1899, JULIUS KLORFEIN, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee under the Refunding and Improvement Mortgage of The Denver and Rio Grande Western Railroad Company's General Mortgage, dated February 1, 1924, CITY BANK FARMERS TRUST COMPANY, as Trustee under THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY'S GENERAL MORTGAGE, dated February 1, 1924, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, and HAROLD S. BAIRD,

Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

Respondents' briefs clearly reveal that there is no adequate answer on the merits to this petition and, in lieu thereof, their principal attempt is to avoid such consideration, by appeal to technicalities.

I

Certain of the respondents, Guaranty Trust Company and City Bank Farmers Trust Company, would seek to avoid consideration of the petition on its merits, by the contention that petitioners do not have standing to file the petition for the reason that they were not granted the status of parties below.

That contention is patently without merit. The Appellate Division of the Supreme Court expressly granted petitioners intervention in the proceeding for appeal purposes (R. 202).

In any event, petitioners, as holders of bonds adversely affected by the adjudication below, have status to appeal (*Cohen* v. *Young*, 127 F. 2d 721, 724; *Hobart* v. *Hobart*, 86 N. Y. 636; *Gats* v. *Gats*, 275 App. Div. 771, 87 N. Y. S. 2d 621; 6 Carmody on N. Y. Pleading and Practice, Section 63).

These respondents made the same contention before the Court of Appeals, on petitioners' motion for leave to appeal to that Court. Respondents urged there, too, and on like grounds that petitioners were not parties and therefore did not have status to move for leave to appeal. Respondent, Guaranty, urged, on that basis, that the motion be dismissed. And had petitioners no right to seek leave, their motion would have been dismissed, under the practice of that Court (*Morris* v. *Chemical Bank & Trust Company*, 291 N. Y. 646, 51 N. E. 2d 930; *In re John Case, et al.*, 292 N. Y. 575, 54 N. E. 2d 691; *People* v. *Whitcomb*, 298 N. Y. 635, 82 N. E. 2d 30). The refusal of the Court of Appeals to dismiss (R. 204) conclusively establishes the right of these petitioners to seek appellate review.

II

Respondent, City Bank, contends that the Federal questions posed by petitioners are not reached for the reason

that the provision of the final judgment (R. 161) in which the Court reserved jurisdiction "to make such allowances as may be just and lawful for the payment of the expenses * * * of any party to this action who may by law be entitled thereto, out of the proceeds of sale * * *," warranted the granting of the allowances challenged on grounds of res judicata.

It should be unnecessary to labor the proposition that a judgment that provides for such allowances as may be just and lawful to parties who may by law be entitled thereto, is not a prior conclusive determination that bars review of a subsequent final order granting allowances that are unjust and unlawful to parties who by law are not entitled thereto.[1]

III

Finally it is urged by respondent, Guaranty, that since petitioners do not challenge the jurisdiction of the State Court to foreclose the Utah Fuel stock and to adjudicate and define the liens of the respective bondholders, it must be held, as a necessary incident thereof, that the State Court had the power to fix allowances to the parties and their counsel and direct their payment out of the proceeds of sale of the Utah Fuel stock.

But the jurisdiction to grant allowances is an incidental one and is not required to permit a court to adjudicate the principal issues. That incidental jurisdiction must be denied when the exercise of that power has been reserved to itself by the Federal reorganization court.

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[1] An identical situation arose in *New York Trust Co. v. New York & Greenwood Lake Ry. Co.*, 156 F. 2d 701. There the Court in its final judgment of foreclosure reserved jurisdiction to pass on fees (pp. 702, 703). Upon subsequent application for allowances by the Trustee and its counsel, the Court denied allowances on the ground that it was without jurisdiction to award them, that the only appropriate source of payment was in the reorganization proceeding.

"The State court has full control over the litigation. But even as an incident thereto, it may not take action which involves the performance of functions which Congress has entrusted to the bankruptcy court" (*Brown* v. *Gerdes*, 321 U. S. 178, 186).

CONCLUSION

The instant petition presents substantial Federal questions that warrant and require review. For the reasons stated in our main brief and in this reply, the petition for certiorari should be granted.

Respectfully submitted,

PERCIVAL E. JACKSON,
Counsel for Petitioners.

Dated: August 20, 1951.